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FEDERAL COMMUNICATIONS COMMISSION
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April 3, 1995

Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
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Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Implementation of Section 309(j) of the Communications
Act -- Competitive Bidding (TEC Waiver Request)
PP Docket No. 93-253

Dear Sir or Madam:

Enclosed herewith on behalf of the Association of Independent Designated Entities ("AIDE") are Comments filed in the above captioned matter.

Kindly contact my office directly with any questions or comments.

Respectfully submitted,

William J. Franklin

William J. Franklin
Attorney for the Association
of Independent Designated
Entities

Encl.

cc: AIDE
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

PP Docket No. 93-

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APR - 3 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

(TEC Waiver Request)

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To: The Commission

COMMENTS OF THE ASSOCIATION OF
INDEPENDENT DESIGNATED ENTITIES

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SUMMARY OF COMMENTS

The Association of Independent Designated Entities ("AIDE") is an unincorporated association of entities likely to qualify as "Designated Entities" for the purposes of Section 309(j).

The Fifth Report and Order carefully assessed the positions of the various parties with respect to rural telephone companies and attribution of interests, the two specific topics of the TEC Waiver Request. TEC participated fully in that proceeding.

I

Under established policy, the Commission will grant rule waivers whenever the purpose of a rule is not served by its strict application. TEC has not qualified for a waiver under this standard. The purpose of the Commission's affiliate rules was to prevent larger companies from obtaining benefits properly reserved for smaller applicants. It is not that the purpose of the rule is not served; TEC merely disagrees with the result.

II

In adopting its size limitations for rural telcos, the Commission explicitly recognized that certain telcos -- like TEC -- would be too large to qualify for the designated entity auctions. The Commission explicitly adopted rules which gave TEC several opportunities to participate in designated-entity auctions and licenses. A waiver of the Rules is not required.

III

The matters which are the subject of the TEC waiver request were decided in the Commission's auction rulemaking. If the

Commission were to grant TEC's requested waiver, then the Commission would be required to make a similar findings for others.

The TEC Waiver Petition is a de facto Petition for Reconsideration of the Commission's PCS auction rules. The Commission has not complied with the Administrative Procedure Act and its Rules in processing the TEC Waiver Petition.

IV

Numerous trade press reports confirm that the effect upon the designed-entity broadband PCS auction is the underlying reason for the Commission's consideration of the TEC Waiver Petition. Neither hindering the development of the designed-entities as PCS licensees nor reducing potential auction revenues is properly cognizable by the Commission.

It is well-established wireless policy that the Commission will promote competition, not protect competitors. Similarly, Section 309(j) of the Communications Act prohibits the Commission from considering the amount of auction revenue as a substantial factor in this proceeding.

Most importantly, the Commission should not reward TEC for challenging the auction rules before the D.C. Circuit. If the Commission grants the TEC Waiver Request, the communications industry will receive the message that every disgruntled participant in a rulemaking should challenge the rules in court and attempt to obtain a stay thereof as a prelude to negotiating a favorable settlement with the Commission.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)
)
(TEC Waiver Request))
)

PP Docket No. 93-26

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

COMMENTS OF THE ASSOCIATION OF
INDEPENDENT DESIGNATED ENTITIES

The Association of Independent Designated Entities ("AIDE"), by its attorney and pursuant to the Commission's Public Notice of March 29, 1995 (DA 95-651), hereby files comments with respect to the request of Telephone Electronics Corporation ("TEC") for a waiver of Section 24.709(a)(1) Commission's Rules.^{1/} AIDE opposes the TEC Waiver Request as unnecessary, improper, and unlawful.^{2/}

The TEC Waiver Request illustrates the axiom that, although any regulatory division can be viewed as arbitrary, its arbitrary

^{1/} Emergency Petition for Waiver, filed by TEC on March 29, 1995 ("TEC Waiver Request"). Although the Commission's Public Notice dramatically collapsed its normal comment period from 30 days down to 3 business days, TEC served its Waiver Request by mail upon the parties to the proceeding.

^{2/} In opposing the TEC Waiver Request, AIDE is not asserting that the Commission's definition of "designated entity" and its attribution rules are either prudent or lawful. Rather, taking the Commission's Rules as they are, AIDE opposes the TEC's proposed use of the waiver procedure to achieve a de facto amendment of the rules. If the rules require modification, the Commission should instead issue a Further Notice of Proposed Rulemaking rather than award ransom to a disgruntled petitioner.

nature (when rationally developed) does not make it incorrect. If one is drawing school-district boundaries, no matter where the boundary is drawn, there will be neighbors whose kids are assigned to different schools. If one is defining "designated entities" or "rural telephone companies," there will always be some entity which is a few dollars too rich or a few access lines too big to fit within the definition, no matter what the definition is. If the Commission stretches its definitions to allow TEC to bid in the entrepreneur's block PCS auctions, then there will be some other company just slightly bigger than (or different from) TEC, who then will seek yet another waiver.

FACTUAL BACKGROUND

In adopting Section 309(j) of the Communications Act, Congress specified that an objective of competitive bidding was to:

Promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women....^{3/}

To implement this goal, Congress required the Commission, in its implementation of competitive bidding regulations, to:

Ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and

^{3/} Section 309(j)(3)(B).

for such purposes, consider the use of tax certificates, bidding preferences, and other procedures....^{4/}

AIDE is an unincorporated association, with membership limited to persons and entities likely to be classified as "Designated Entities" under Section 309(j) of the Communications Act.

Various AIDE members have extensive legal, technical, financial, and communications backgrounds. Many have owned or managed small businesses, and understand the special needs and problems of small and start-up businesses. The women and minority AIDE members also know the unique burdens which they bear. Accordingly, AIDE has a special expertise to comment upon the TEC Waiver Request from the perspective of the various Designated Entities.

OVERVIEW OF APPLICABLE COMMISSION RULES

By way of background, the Commission originally defined a "designated entity" as primarily a small business with no more than a \$6 million net worth and not more than \$2 million in annual after-tax profits, or a business with at least 50.1% equity ownership and control held by women and/or minorities.^{5/} Upon reconsideration, the Commission decided that "small businesses" for broadband PCS auctions could have up to \$40 million

^{4/} Section 309(j) (4) (D).

^{5/} Competitive Bidding, 9 FCC Rcd 2348, 2410-11 (1994) (Second Report and Order) (PP Docket No. 93-253) (47 CFR §1.2110 as adopted April 20, 1994).

in gross revenues and \$100 million in assets.^{6/} The Commission further provided that "designated entities" would not bid in an auction limited only to themselves, but would instead participate in "entrepreneurs' blocks" auctions with "entrepreneurs," i.e., larger companies with up to \$125 million in annual gross revenues and \$500 million in total assets.^{7/} These financial caps only apply to applicant itself, its controlling shareholders, and other "attributable" investors holding 25% or more in total equity.^{8/}

The Fifth Report and Order carefully assessed the positions of the various parties with respect to rural telephone companies and attribution of interests, the two specific topics of the TEC Waiver Request. After due consideration, the Commission defined a "rural telephone company" as a "local exchange carrier[] having 100,000 or fewer access lines, including all affiliates."^{9/} The Commission concluded that this definition:

will include virtually all the telephone companies who genuinely are interested in providing services to rural areas [and] will encourage participation by legitimate

^{6/} Competitive Bidding, 9 FCC Rcd 5532, 5606-10 (1994) (Fifth Report and Order) (PP Docket No. 93-253). Under these rules, small businesses were not subject to any limitation on total assets. Id. at 5608 n.153. Further, a consortium -- of unlimited size -- of small businesses would remain qualified as a "small business" for the auction. Id. at 5610.

^{7/} Id. at 5584-88, 5600-03.

^{8/} Id. at 5586 n.99. Other, non-attributable investors in entrepreneurs or small businesses are not subject to any financial limitations. Id. at 5581-82, 5601.

^{9/} Id. at 5615-18.

rural telephone companies without providing special treatment to large LECs.^{10/}

Similarly, after due consideration, the Commission also adopted the Small Business Administration's attribution rules for the purpose of defining the affiliates of designed-entity broadband PCS applicants.^{11/} It did so

to prevent entities that, for all practical purposes, do not meet [the designated entity and entrepreneur] size standards from receiving benefits targeted to smaller entities.^{12/}

Upon further reconsideration, the Commission eliminated its earlier limitation that each individual investor in an eligible entrepreneur or small business have a personal net worth less than \$100 million or \$40 million, respectively.^{13/} Such investors may now possess unlimited wealth without disqualifying a "small business" or "entrepreneur" applicant. The Commission further relaxed its standards by requiring that only 15% of the equity of an "entrepreneur," "small business," or "minority or woman-owned business" be held by a principal who fits the Commission's qualifications.^{14/} In other words, under the Commission's current PCS auction rules, an applicant can qualify as an "entrepreneur" or "small business" both with Fortune 500

^{10/} Id. at 5618.

^{11/} Id. at 5619-25.

^{12/} Id. at 5619.

^{13/} Competitive Bidding, 10 FCC Rcd 403, 420-21 (1994) (PP Docket No. 93-253) (Fifth Memorandum Opinion and Order).

^{14/} Id. at 435-46.

companies each holding less than 25% ownership (or in some cases, less than 50%) and with multi-billionaires as personal investors.

Upon further reconsideration, the Commission also relaxed its attribution rules specifically to "enable a larger number of existing companies ... to compete in the entrepreneurial block."^{15/} It also specifically considered TEC's arguments regarding the propriety of the definition of the rural telephone company.^{16/}

In other words, the rules from which TEC seeks a waiver were adopted as an integral part of the Commission's auction rulemaking; they were not an accidental oversight which somehow "fell through the cracks" of this complex rulemaking.

OVERVIEW OF THE TEC WAIVER REQUEST

TEC seeks a waiver of Section 24.709(a)(1) of the Commission's Rules so that the apparently substantial revenues of its non-telco affiliates may be excluded in determining whether TEC's telcos meet the gross revenue cap of \$125 million.^{17/} TEC also requests a "limited waiver that would permit its rural telephone companies to bid on channel C and F licenses only in those [BTAs]

^{15/} Id. at 453.

^{16/} Id. at 460-63.

^{17/} TEC Waiver Request at 1, 6. Although TEC asserts (at 6) that its non-telco subsidiaries operate in a "volume-intensive business with high operating costs and small profit margins", TEC supplied no cost or revenue data to support its argument.

where they provide telephone service and which have a population of less than 300,000...."^{18/}

As the Commission is well aware, TEC has appealed the broadband PCS auction rules to the D.C. Circuit, and has obtained a stay of the block-C and -F auctions pending a resolution of its appeal. In order to entice the Commission to grant its waiver, TEC asserts (at 7) that it "would have no incentive to continue with its appeal, and its lawsuit could be dismissed, allowing the auctions to proceed without further delay" if the Commission were to grant the waiver.

COMMENTS

I. THE TEC WAIVER REQUEST DOES NOT FIT WITHIN THE COMMISSION'S CRITERIA FOR A RULE WAIVER.

Under established policy, the Commission will grant rule waivers whenever the purpose of a rule is not served by its strict application.^{19/} TEC has not qualified for a waiver under this standard.

As quoted above, the purpose of the Commission's affiliate rules was to prevent larger companies from obtaining benefits properly reserved for smaller applicants. And yet, TEC seeks its waiver specifically because it is a larger company seeking the auction benefits reserved for smaller companies. It is not that

^{18/} Id. at 1-2. Tec also requests confirmation (at 2 n.2) that its telcos are eligible for partitioned licenses in bigger BTAs.

^{19/} See WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), cert. denied 409 U.S. 1027 (1972).

the purpose of the rule is not served; here, TEC concedes that the purpose is being served. TEC merely disagrees with the result which the rule produces. Accordingly, it has not qualified for a rule waiver under the Commission's criteria.

II. TEC HAS SEVERAL OTHER ALTERNATIVES FOR PARTICIPATING IN THE DESIGNATED-ENTITY BROADBAND PCS AUCTIONS AND FOR PROVIDING PCS WITHIN ITS TELCO SERVICE AREAS; A WAIVER IS NOT REQUIRED.

In adopting its size limitations for rural telcos, the Commission explicitly recognized that certain telcos -- like TEC -- would be too large to qualify for the designated entity auctions. However, the Commission explicitly adopted rules which gave such larger telcos the ability to participate in designated-entity auctions:

[W]e believe that other applicants and licenses will find rural telephone companies attractive entities to negotiate with, because of the efficiencies associated with rural telephone companies [sic] existing infrastructure. Additionally, since a licensee will be permitted to assign a portion of its license to a rural telephone company without violating the transfer and holding requirements, we expect that licensees will actively solicit participation by rural telephone companies.^{20/}

Further, as does any other larger company, TEC has the ability to become a passive investor in designated entities seeking to bid either in the TEC telco service areas or throughout the United States. Of course, TEC also has the ability to bid for non-designated-entity BTA licenses in PCS frequency blocks D and E.

^{20/} Fifth Memorandum Opinion and Order, *supra*, 10 FCC Rcd at 463.

These alternatives -- explicitly adopted by the Commission -- provide TEC with several meaningful alternatives to participate in either the PCS auctions or in the provision of PCS service. A waiver of the Commission's Rules is not required.

Finally, the existence of these alternatives confirms that TEC's real complaint is not that the Commission's auction rules absolutely exclude it from the PCS auction or PCS service, but that the rules exclude TEC from participating as a controlling equity owner while receiving bidding credits and other preferences. The rules were intended to do so, and they obviously work as written.

III. GRANTING OF THE TEC WAIVER REQUEST WOULD BE "RULEMAKING BY WAIVER," A PROCEDURE INCONSISTENT WITH THE ADMINISTRATIVE PROCEDURE ACT.

Section 1 of the Administrative Procedure Act, 5 USC §551(4), defines a "rule" as a "statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy...." Section 4 of the Administrative Procedure Act, 5 USC §553, and Section 1.415 of the Commission's Rules, requires that the Commission provide notice of all proposed rules in the Federal Register and provide an opportunity for written comment and reply comment.

The matters which are the subject of the TEC waiver request were decided in the Commission's auction rulemaking.^{21/} TEC

^{21/} TEC claims (at 2 n.3) that its request for a waiver limited to smaller BTAs presents "a request for relief" no previously presented to the Commission, it is beyond doubt that
(continued...)

participated in the rulemaking, and advanced facts similar to those now advanced in its waiver request. Moreover, if the Commission were to grant TEC's requested waiver and hold that revenues attributable to affiliates in "volume-intensive business[es] with high operating costs and small profit margins" (TEC Waiver Request at 6) were not disqualifying for PCS auction purposes, then the Commission would be required to make a similar findings for others as well.

In other words, the TEC Waiver Petition is a de facto Petition for Reconsideration of the Commission's PCS auction rules.^{22/} Both the Administrative Procedure Act and the Commission's Rules require specific procedures to be followed in considering this Petition. The Commission has not done so, failing to publish notice of the Petition in the Federal Register or to afford others the right to file reply comments.^{23/}

^{21/} (...continued)

(1) such relief was well within the scope of the auction rule-making and (2) TEC had opportunity to present such a request for relief to the Commission had TEC chosen to do so. The Commission should not credit TEC for engaging in "piecemeal" pleading.

^{22/} Indeed, the Commission's authority to entertain the TEC "reconsideration" Petition while TEC is appealing the PCS auction rules is unclear.

^{23/} The Commission's Public Notice give interested parties only three (3) business days to prepare and file their Comments. This period of time is too short to allow the research and preparation of substantial comments. The Public Notice also allowed TEC -- and only TEC -- the right to file reply comments. Thus, the Public Notice denied important procedural due process rights to AIDE and other third parties.

Accordingly, the Commission's treatment of the TEC Waiver Petition as established by the Public Notice is inconsistent with the Administrative Procedure Act and the Commission's Rules.

IV. GRANTING THE TEC WAIVER REQUEST WOULD BE A HORRIBLE PRECEDENT AND POOR PUBLIC POLICY.

Although not apparent from the face of the TEC Waiver Petition, numerous trade press reports confirm that the effect upon the designated-entity broadband PCS auction is the underlying reason for the Commission's consideration of the TEC Waiver Petition. Those reports express two main concerns: delay in the designated-entity auctions would hinder the development of the designated-entities as PCS licensees, and delay in the designated-entity auctions would reduce the value of the designated-entity licenses, thus reducing auction revenues. Neither of these motivations is properly cognizable by the Commission.

It is well-established wireless policy that the Commission will promote competition, not protect competitors. Under this policy the Commission has no obligation to assure that TEC may participate as a stand-alone applicant in the designated-entity PCS auctions. The Commission's designated-entity rules apparently have encouraged numerous entities to explore participation in those auctions. The Commission may reasonably expect that competition (i.e., bidding) will occur for the block-C and -F PCS licenses, and that the resulting licensees to compete to provide PCS service. The Commission's policy obligations cease when that competition occurs.

Further, the Commission may not consider the amount of auction revenue as a substantial factor in this proceeding. Section 309(j) of the Communications Act carefully proscribes the Commission's consideration of auction revenues:

(7) Consideration of revenues in public interest determinations.-

(A) Consideration prohibited.-In making a decision pursuant to Section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited.-In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of federal revenues from the use of a system of competitive bidding under this subsection.

(Emphasis added.) Thus, the Commission must base its decisions in this proceeding upon traditional public interest factors and the specific statutory objectives of competitive bidding, and not revenue maximization.

Most importantly, the Commission should not reward TEC for challenging the auction rules before the D.C. Circuit. If the Commission grants the TEC Waiver Request, the communications industry will receive the message that every disgruntled participant in a rulemaking should challenge the rules in court and attempt to obtain a stay thereof as a prelude to negotiating a favorable settlement with the Commission. AIDE doubts that the

Commission wishes to have its appellate review load dramatically increased as to both number and intensity of appeals. And yet, if the TEC Waiver Petition is granted, that increase will almost certainly occur.

CONCLUSION

Accordingly, the Association of Independent Designated Entities respectfully requests that the Commission deny the TEC Waiver Request as set forth herein.

Respectfully Submitted,

ASSOCIATION OF INDEPENDENT DESIGNATED ENTITIES

By: William J. Franklin
William J. Franklin
Its Attorney

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CERTIFICATE OF SERVICE

I, Trudy Jones, a legal assistant for the law firm William J. Franklin, Chartered, hereby certify that a copy of the foregoing Comments of the Association of Independent Designated Entities was sent by U.S. mail, first-class postage prepaid, this 3rd day of April, 1995 to:

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Trudy Jones